Filed 12/18/08 Marriage of Adams CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of GORDON L. and DIANE M. ADAMS.	
GORDON L. ADAMS, Appellant, v. DIANE M. ADAMS, Respondent.	G039312 (Super. Ct. No. 05D001065) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Josephine Staton Tucker, Judge. Affirmed.

Law Offices of Jeffrey W. Doeringer and Jeffrey W. Doeringer for Appellant.

Brian G. Saylin for Respondent.

* * *

Gordon Adams appeals from the judgment dissolving his marriage to Diane Adams, characterizing and dividing their property, and awarding spousal support. Gordon contends the trial court erroneously determined the date of separation and mischaracterized his residence as community property. We find substantial evidence supports the trial court's determinations and affirm.[1]

FACTS

Gordon and Diane married in 1972 and had four children. After 24 years, in June 1996, Gordon moved out of the family home and moved in with a friend, David Morris. He and Diane had not had sexual relations for at least a year. Gordon testified, "The marriage had been dysfunctional for a number of years, and I had an affair . . . . The relationship that I had was not working, not to my satisfaction, and I needed to get away and think about it. . . .[¶] There was no need [to file for divorce then.] I wasn't sure I wasn't coming back. When I left there was no thought of me getting an instantaneous divorce." Gordon did not file a petition for dissolution until February 2005, almost nine years later.

Gordon lived with Morris for approximately two years and paid rent in the amount of $400 a month. During the time Gordon lived with Morris, Gordon joined a dating service called Great Expectations. Although Morris did not recall any conversations with Gordon about his social activities, Morris described Gordon as "[d]efinitely involved with other individuals" rather than one who kept to himself. He did not discuss divorce with Morris.

When Gordon left, he told Diane he would "make financial arrangements as much as I possibly could to make sure she and the children could stay in the house." So he deposited his paycheck into their joint account and took out "a minimal amount of

[1] Gordon has moved to augment the record with a document inadvertently overlooked in the designation. We grant the motion. Gordon also has requested judicial notice of correspondence between counsel concerning post-judgment matters. We deny the request.

money, whatever it took just to get me by," to cover his expenses. Diane paid the bills for both of them, including payments for the loan and insurance on Gordon's car. Gordon bought several cars during the nine year period, and Diane was on the title to all of them.

Gordon and Diane were half-owners in a development company called JAG Land Company (JAG), which is located in Missouri. Sporadically, they would receive checks from JAG, which were deposited into the joint account. "Then we would decide what the use of the money would be. [W]e would look at any household expenses, taxes, education costs." After they paid the necessary expenses, they divided the leftover funds equally, "and those funds would be our own individual funds." They handled bonuses and tax refunds the same way. By August 1998, Gordon was making more money, and the payroll department of his employer split his income and sent one check to him and one to their joint account. In 2001, they opened a home equity line of credit against the Lake Forest property for emergencies. They also had a college account that was "solely for the educational benefit of our children."

In August 1998, Gordon purchased a condominium in the city of Orange (the Orange condo). "By that point in time I decided that my marriage was dead and that I was not moving back into the house." He told Diane he was looking for his own residence. Gordon testified he made the down payment on the condo with funds he had saved from the JAG distributions. The loan application, however, was made on behalf of both Gordon and Diane. Gordon listed the status of each of them as "married," although the application gave the option to check "separated," and gave the family home as their address. The loan application indicated the Orange condo was intended to be a "Secondary Residence," and title was taken in the names of both Gordon and Diane, "husband and wife as joint tenants." Gordon made the mortgage payments from his account. The parties refinanced the property in 2001 and left title in joint tenancy.

Gordon testified he took title in both their names because he received "bad advice" from a real estate agent.

Gordon saw his children weekly most of the time, typically spending one day a weekend and having dinner at the family home. This continued until the youngest child got her driver's license, in 2002. After Gordon moved to the Orange condo, the children would sometimes visit him there. Diane visited there a "couple of times," and once "actually even helped around there for a little bit . . . ." Gordon spent the night at the family home with the children twice when Diane was away. He dated occasionally and "let it be known that I was seeing other people."

Gordon sold the Orange condo a few weeks later and purchased his current residence, a condominium in Foothill Ranch, with the funds from the sale. The day before escrow closed, on March 18, 2003, he asked Diane to sign another interspousal transfer deed, transferring any interest she had in the Foothill Ranch property to him as his separate property. Gordon took title to the property as his separate property. Diane testified she signed the interspousal transfer deed because Gordon told her "I had to sign it so we could get the house in Foothill Ranch." He may have explained that by signing the deed, she would have no interest in the property.

The trial court gave an oral decision, and both parties requested a statement of decision. Diane prepared the proposed statement of decision, and both parties filed objections. Gordon objected to the exclusion of evidence which, he argued, supported an earlier date of separation, including the omission of "the fact that [Diane] admitted that she agreed to split the balance of the JAG Land funds which were not used to pay community obligations . . . . The fact that he used funds he received pursuant to the agreement to purchase his own separate residence is evidence of subjective intent to end this marriage."

The trial court issued its statement of decision on the requested issues. It found that Gordon was not sure whether he was returning to the marriage when he moved

out in 1996. During the years they lived apart, the parties did not socialize or vacation together, and Gordon's time at the family home was primarily to see his children. Gordon testified he believed his marriage was "dead" at the time he purchased the Orange condo in 1998. "However, after that date, [Gordon] and [Diane] continued to have joint bank accounts, continued to refinance property in both names, continued to maintain and use joint lines of credit, and continued to file joint tax returns.

On February 24, 2003, [Gordon] asked [Diane] to transfer the Orange condo into his name alone. In that same time period, [Gordon] told [Diane] that he wanted to divide up the assets of the marriage."

The trial court found the date of separation was February 24, 2003. "[Gordon's] conduct prior to that time did not reveal a clear intent to end the marriage. While he claims that he put title to the condo in both names in 1998 because a real estate agent told him that, as a married man, he had to, that misses the point. If [Gordon] incorrectly believed that a married man had to take title in both names, he could have taken steps then to end the marriage and place the property in his name alone. He did not do so. Likewise, [Gordon] continued to maintain other financial entanglements with [Diane] after 1998 that made his intentions to end the marriage less than clear." Although the parties continued to have some financial ties after February 24, 2003, the trial court found that "financial entanglements alone are not dispositive of the date of separation issue. . . . When looking at the totality of the evidence, the mere fact that some financial connections remained unsevered after that date does not change the result."

In the statement of decision, the trial court found the JAG distributions, emanating from a community investment, were community property, "both before and after the date of separation. There has been no transmutation that meets the requirements of Family Code [section] 852 [subdivision] (a)." In the subsequent judgment, it ruled "[t]hat the Foothill Ranch property is a community asset as it was purchased with all

community funds, subject to [Gordon's] *California Family Code* [section] 2640 claim; and the deed is, therefore, reformed to include [Diane's] name."

DISCUSSION

Date of Separation

The date of separation determines the point after which the earnings and accumulations of each spouse are considered separate property. (Fam. Code, § 771, subd. (a).) "'[T]he date of separation occurs when either of the parties *does not* intend to resume the marriage *and* his or her actions bespeak the finality of the marital relationship.'" (*In re Marriage of Manfer* (2006) 144 Cal.App.4th 925, 930, quoting *In re Marriage of Hardin* (1995) 38 Cal.App.4th 448, 451.) "'The husband's and the wife's subjective intents are to be objectively determined from all of the evidence reflecting the parties' words and actions during the disputed time in order to ascertain when during that period the rift in the parties' relationship was final.'" (*Ibid.*)

The determination of the date of separation is a factual question. (*In re Marriage of Manfer*, *supra*, 144 Cal.App.4th at p. 930.) "No particular facts are per se determinative"; the trial court must consider "[a]ll factors bearing on either party's intentions . . . . The ultimate test is the parties' subjective intent and all evidence relating to it is to be objectively considered by the court." (*In re Marriage of Hardin*, *supra*, 38 Cal.App.4th at p. 452.) Where a statement of decision is requested after a nonjury trial, and where ambiguities and omissions in the proposed statement of decision are brought to the attention of the trial court, the appellate court will not infer factual findings to support the judgment. Rather, all factual findings necessary to support the judgment must be included in the statement of decision and must be supported by substantial evidence. (See *Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 58-60.)

There is substantial evidence to support the court's finding that the date of separation was February 24, 2003. That was the first time Gordon made an affirmative

step to divide the parties' assets by asking Diane to sign the Orange condo over to him. Until then, all the assets, including ones purchased during the time the parties lived apart, had been held jointly.

Characterization of Foothill Ranch

Gordon contends the Foothill Ranch property should be his separate property. He supports this contention with several assertions: (1) He insists the Orange condo was his separate property because it was purchased with the JAG funds, which he and Diane agreed were separate; (2) the Foothill Ranch property was purchased after the date of separation in his name alone; and (3) Diane executed an interspousal transfer deed releasing all her interest in the property after the date of separation.

The trial court did not characterize the Foothill Ranch property in the statement of decision, only in the judgment, and Gordon's objections to the statement of decision did not challenge that omission. But Gordon did challenge the characterization of the JAG funds as community property in the statement of decision. Therefore, we are required to presume the trial court made all the factual findings necessary to support the characterization of the Foothill Ranch property, if the record contains substantial evidence to support those presumed findings. But as to the characterization of the JAG funds, all factual findings necessary to support the judgment must be included in the statement of decision and must be supported by substantial evidence. (*Fladeboe v. American Isuzu Motors, Inc.*, *supra*, 150 Cal.App.4th at pp. 58-60.)

There is no dispute that the JAG funds were originally community property. But Gordon argues his agreement with Diane to split excess funds after community obligations were satisfied changed the character of those funds to each party's separate property. The trial court found otherwise.

If spouses wish to change the character of their property during the marriage, they must do it in writing. Family Code section 852, subdivision (a) provides: "A transmutation of real or personal property is not valid unless made in writing by an

express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." There was no writing between Gordon and Diane that transmuted the JAG funds from community to separate property. Even their executed oral agreement to split control over the excess funds is not sufficient to change the character of the property.

Because the Orange condo was purchased with the community JAG funds during the marriage, it was community property. On February 24, 2003, Diane signed an interspousal transfer deed purporting to transfer her interest in the Orange condo to Gordon as his separate property. We must presume the trial court found this deed to be invalid, because the judgment states that the Foothill Ranch property was purchased with community funds, and the source of those funds was the sale of the Orange condo.

The Foothill Ranch property was purchased on March 19, 2003, 23 days after the date of separation. On March 23, 2003, Diane signed another interspousal transfer deed, transferring all her interest in the property to Gordon as his separate property. The trial court expressly found this deed to be invalid and reformed the title to the Foothill Ranch property to include her name.

The record contains sufficient evidence to support these legal conclusions. Diane testified she signed both deeds because Gordon told her if she did so, he would sign a deed transferring the family home to her. Gordon is held to the standard of a fiduciary with respect to the parties' community property. "Each spouse shall act with respect to the other spouse in the management and control of the community assets and liabilities in accordance with the general rules governing fiduciary relationships which control the actions of persons having relationships of personal confidence as specified in Section 721, until such time as the assets and liabilities have been divided by the parties or by a court . . . ." (Fam. Code § 1100, subd. (e).) Fam. Code Section 721 provides: "This confidential relationship imposes a duty of the highest good faith and fair dealing

on each spouse, and neither shall take any unfair advantage of the other." (Fam. Code § 721, subd. (b).)

When spouses enter into an agreement under which one spouse gains an advantage over the other, the agreement is presumed to have been obtained through undue influence. The advantaged spouse bears the burden of demonstrating that it was not so obtained. (*In re Marriage of Bonds* (2000) 24 Cal.4th 1, 27-28.) Gordon did not carry his burden to prove the interspousal transfer deed signed by Diane were not the result of undue influence, thus the Foothill Ranch property retains its original character of community property. Gordon will be reimbursed for his separate property payments reducing the loan on the property. (Fam. Code § 2640, subd. (a).)

DISPOSITION

The judgment is affirmed. Diane is entitled to costs on appeal.

SILLS, P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.